For the reasons stated above, I confirm the order I made in chambers and dismiss the defendants' application with costs. The third and fourth defendants will pay the costs of further argument in open court to the plaintiff.

Application dismissed.

Solicitors: *Thevin Chandran Siva & Jamal; Ariff & Co.*

Reported by *Kevin Mathews*

Official Assignee of the Property of Senator Ibrahim bin Haji Yaakob, Bankrupt v Siti Ramlah bte Bajau

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO 168 OF 1980
ZAKARIA YATIM J
27 SEPTEMBER 1990

Bankruptcy — Transfer of land to respondent wife — For love and affection — Transferor became bankrupt within two years of transfer — Transferor died — Whether transfer was voluntary settlement and void against Official Assignee — Respondent claimed transfer within exceptions — Bankruptcy Act 1967, s 52 — Bankruptcy Act 1869 [UK], s 91 — Bankruptcy Act 1914 [UK], s 42

Malay Customary Law — Harta sepencarian — Whether respondent entitled to half share

This is an application by the Official Assignee, inter alia, for:
(1) a declaration that the transfer of the land comprised in Grant No 11027, lot No 8, mukim Batu ('the said land'), by the bankrupt to his wife Siti Ramlah bte Bajau ('the respondent') on 22 December 1978 was a voluntary settlement and is void against the Official Assignee under s 52 of the Bankruptcy Act 1967; and
(2) an order that the Pendaftar Geran-Geran Tanah, Wilayah Persekutuan ('the Pendaftar'), the proper registering authority, do cancel the said transfer.

On 27 October 1980, receiving and adjudication orders were made against the bankrupt on the petition of Bank of America National Trust and Savings Association. During investigation it was discovered that the bankrupt had transferred the said land to his wife, the respondent, on 22 December 1978 for love and affection. The Assistant Official Assignee contended that the transfer of the said land by the bankrupt was a voluntary settlement or transfer within the meaning of s 52 of the Bankruptcy Act 1967, and that as the transfer was made within two years prior to the transferor becoming a bankrupt, such transfer was absolutely void against the Official Assignee. The respondent denied that the transfer was a voluntary settlement and contended that the settlement of the said land came within the exceptions to s 52 of the Bankruptcy Act 1967 since it was made on or for the wife of the settlor which was accrued to the settlor after marriage in the right of his wife. She further claimed to be entitled under her personal law and pursuant to the Malay 'adat' law to have one-half share of the said land as 'harta sepencarian' at the time of the bankrupt's death.

Held, allowing the application to the extent indicated below:

(1) The words 'property which has accrued to the settlor after marriage in right of his wife ...' in s 52 of the Bankruptcy Act 1967, mean that the property must be in the name of the wife. It is immaterial whether she acquired it before or after the marriage. The property is accrued to the husband solely by virtue of his position as husband when the wife dies intestate.

(2) After considering the facts in the present case, the court found that the respondent's case did not come under any of the exceptions to s 52 of the Bankruptcy Act 1967. In the circumstances, the transfer of the said land to the respondent was absolutely void against the Official Assignee under s 52 of the Bankruptcy Act 1967.

(3) Once it is established that property is acquired during the subsistence of the marriage out of the joint resources of the husband and wife, a presumption arises that the property is 'harta sepencarian'. In view of the evidence contained in the respondent's affidavit, there was a presumption that the said land was 'harta sepencarian'. There was no evidence before the court to rebut the presumption. The court was of the opinion that a wife can only claim her share of 'harta sepencarian' when she is divorced by her husband or when the husband is dead. Hence, the respondent was entitled to one-half share of the said land under 'harta sepencarian' upon the death of her husband, and if the said land was sold to pay the creditor or creditors of the bankrupt, she was entitled to receive half of the proceeds of the sale of the said land and her share of the proceeds of the sale could not be used to pay her late husband's creditor or creditors.

[Bahasa Malaysia summary

Ini adalah satu permohonan oleh Pegawai Pemegang Harta, antara lain, untuk:

(1) satu deklarasi bahawa pemindahan tanah yang terkandung di dalam Geran No 11027, lot No 8, mukim Batu ('tanah tersebut'), oleh si bankrap kepada isterinya Siti Ramlah bte Bajau ('responden itu') pada 22 Disember 1978 adalah satu 'settlement' sukarela dan adalah tidak sah terhadap Pegawai Pemegang Harta di bawah s 52 Akta Kebankrapan 1967; dan

(2) satu perintah bahawa Pendaftar Geran-Geran Tanah, Wilayah Persekutuan ('Pendaftar itu'), pihak mendaftar yang teratur, membatalkan pemindahan itu.

Pada 27 Oktober 1980, perintah penerimaan dan penghukuman telah dibuat terhadap si bankrap melalui petisyen Bank of America National Trust and Savings Association. Semasa penyiasatan, telah dijumpai bahawa si bankrap telah memindahkan tanah tersebut kepada isterinya, responden itu, pada 22 Disember 1978 kerana kasih dan sayang. Penolong Pegawai Pemegang Harta menghujah bahawa pemindahan tanah tersebut oleh si bankrap adalah satu 'settlement' sukarela atau pemindahan di bawah makna s 52 Akta Kebankrapan 1967, dan bahawa kerana pemindahan dibuat di dalam dua tahun sebelum pemindah menjadi bankrap, pemindahan sedemikian adalah tidak sah sama sekali terhadap Pegawai Pemegang Harta. Responden menafikan yang pemindahan itu adalah satu 'settlement' sukarela dan menghujah bahawa 'settlement' tanah tersebut termasuk di dalam kecualian kepada s 52 Akta Kebankrapan 1967, memandangkan yang ia telah dibuat ke atas atau untuk isteri pembuat 'settlement' yang terakru kepada pembuat 'settlement' selepas perkahwinan dalam hak isterinya. Responden seterusnya menuntut yang ia berhak di bawah undang-undang persendiriannya dan mengikut undang-undang adat Melayu kepada setengah bahagian tanah tersebut sebagai harta sepencarian pada masa kematian si bankrap.

Diputuskan, meluluskan permohonan itu setakat yang dikemukakan di bawah:

(1) Perkataan 'property which has accrued to the settlor after marriage in right of his wife ...' dalam s 52 Akta Kebankrapan 1967 bermakna yang harta itu mestilah di dalam nama si isteri. Tidaklah penting sama ada si isteri memperolehinya sebelum atau selepas perkahwinan. Harta terakru kepada si suami hanya kerana kedudukannya sebagai suami apabila si isteri mati tanpa wasiat.

(2) Selepas mempertimbangkan fakta-fakta kes ini, mahkamah mendapati bahawa kes responden tidak termasuk di bawah mana-mana kecualian kepada s 52 Akta Kebankrapan 1967. Dalam keadaan sedemikian, pemindahan tanah tersebut kepada responden adalah tidak sah sama sekali terhadap Pengawai Pemegang Harta di bawah s 52 Akta Kebankrapan 1967.

(3) Apabila terdapat bukti bahawa harta itu diperolehi semasa penerusan perkahwinan daripada sumber bersama suami dan isteri, satu anggapan didirikan bahawa harta itu adalah harta sepencarian. Memandangkan keterangan di dalam afidavit responden, terdapat anggapan bahawa tanah tersebut adalah harta sepencarian. Tidak ada keterangan di depan mahkamah untuk melawan anggapan itu. Mahkamah berpendapat bahawa seorang isteri hanya boleh menuntut bahagian harta sepencarian apabila ia diceraikan oleh suaminya atau apabila suaminya mati. Jadi, responden berhak kepada setengah bahagian tanah tersebut sebagai harta sepencarian pada kematian suaminya, dan jika tanah tersebut dijual untuk membayar pemiutang si bankrap, beliau berhak menerima setengah hasil jualan tanah tersebut dan bahagian beliau dalam hasil jualan itu tidak boleh digunakan untuk membayar pemiutang mendiang suaminya.]

Cases referred to

1 *Re Pumfrey, ex p Hillman* (1879) 10 Ch D 622 (refd)
2 *Re Abbott (A Bankrupt)* [1983] 1 Ch 45 (follod)
3 *Borton* v *Official Receiver* (1986) 4 ACLC 533 (follod)
4 *Re Bower Williams, ex p Trustee* [1927] All ER 275 (follod)
5 *Roberts alias Kamarulzaman* v *Ummi Kalthom* [1966] 1 MLJ 163 (follod)
6 *Mohamed* v *Commissioner of Lands & Mines, Trengganu & Anor* [1968] 1 MLJ 227 (refd)
7 *Boto' bte Taha* v *Jaafar bin Muhamed* [1985] 2 MLJ 98 (refd)
8 *Habsah bte Mat* v *Abdullah bin Jusoh* [1950] MLJ 60 (refd)
9 *Hujah Lijah bte Jamal* v *Fatimah bte Mat Diah* [1950] MLJ 63 (follod)

Legislation referred to

Bankruptcy Act 1967 ss 2, 52
Bankruptcy Act 1869 [UK] s 91
Bankruptcy Act 1914 [UK] s 42

Azizan bin Othman for the respondent.
VP Pradhan for the petitioning creditor.
Zaleha bte Yusof for the Official Assignee.

Cur Adv Vult

Zakaria Yatim J: This is an application by the Official Assignee for:

(1) a declaration that the transfer of the land comprised in Grant No 11027, lot No 8, mukim Batu ('the said land'), by the bankrupt, Senator Ibrahim bin Haji Yaakob, to his wife, Siti Ramlah bte Bajau (the respondent) on 22 December 1978 was a voluntary settlement and is void against the Official Assignee under s 52 of the Bankruptcy Act 1967;
(2) an order that the Pendaftar Geran-Geran Tanah, Wilayah Persekutuan (hereinafter referred to as 'the Pendaftar'), the proper registering authority, do cancel the said transfer; and
(3) that the respondent pay the costs of this application.

On 27 October 1980, receiving and adjudication orders were made by this court against Senator Ibrahim bin Haji Yaakob (hereinafter referred to as 'the bankrupt') on the petition of Bank of America National Trust and Savings Association. During the course of the investigation into the affairs of the bankrupt, it was discovered that he had transferred the said land to his wife, who is the respondent, on 22 December 1978 for love and affection.

Mr Liang Hien Tien, the Assistant Official Assignee, in his affidavit in support of the application contended that the transfer of the said land by the bankrupt was a voluntary settlement or transfer within the meaning of s 52 of the Bankruptcy Act 1967. He stated that as the transfer of the said land was made within two years prior to the transferor becoming a bankrupt, such transfer was absolutely void against the Official Assignee.

The respondent in her affidavit in reply averred as follows. She was the lawful widow of the bankrupt. They were lawfully married in Kuala Lumpur on 30 April 1942. The transfer of the said land by the bankrupt to the respondent did not constitute and was not a voluntary settlement or transfer within the meaning of s 52 of the Bankruptcy Act 1967 and the transfer was not absolutely void against the Official Assignee. The settlement of the said land came within the exceptions to s 52 of the Bankruptcy Act 1967 since it was made on or for the wife of the settlor which was accrued to the settlor after marriage in the right of his wife. The respondent claimed that she and her husband, the bankrupt, purchased the said land on 17 August 1943. The said land was acquired during the subsistence of their marriage by the bankrupt out of their joint resources and efforts, although the land was registered in the name of her husband. She claimed that, as the lawful widow, she was entitled under her personal law and pursuant to the Malay 'adat' law to have one-half share of the said land as 'harta sepencarian' at the time of her husband's death. According to her, even if the transfer of the said land by the bankrupt to her was a voluntary settlement or transfer, the transfer was not absolutely void against the Official Assignee as she claimed that the transfer was made merely to perfect her title to it. The transfer was made by her husband because of his deteriorating health conditions. Accordingly, the settlement did not fall within the meaning of s 52. She

contended that, assuming that the transfer was absolutely void against the Official Assignee, her share of the said land was not affected.

In order to consider the application, it is necessary to state the relevant provisions of s 52 of the Bankruptcy Act 1967. Under s 52(1) of the Act, any settlement of property shall, if the settlor becomes a bankrupt within two years after the date of the settlement be absolutely void against the Official Assignee, except in the following cases, namely:

(1) a settlement made before and in consideration of marriage; or
(2) a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration; or
(3) a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife.

The word 'settlement' is defined in sub-s 3 of s 52 to include any conveyance or transfer of property. Under s 2 the word 'property' includes land and every description of property, whether real or personal and whether situated in the Federation or elsewhere. It is not in dispute that in the present case the property in question is a piece of land which is situated in Selangor.

From the evidence, it is established that receiving and adjudicating orders were made against the respondent's husband on 27 October 1980. The said land which was registered in the bankrupt's name was transferred to the respondent on 22 December 1978. The evidence shows that the respondent's husband became a bankrupt within two years after the date of the transfer of the said land. Such transfer would be absolutely void against the Official Assignee unless the settlement falls within one of the three exceptions.

The first exception does not apply to the present case because the transfer was not made in consideration of marriage.

The next question is whether the second exception is applicable here, that is whether the transfer was made to the respondent as purchaser for valuable consideration.

According to the memorandum of transfer (Borang 14A) exhibited to Liang Hien Tien's affidavit, the said transfer was made for love and affection. In my opinion the said transfer, which was made for love and affection, is void under s 52 of the Bankruptcy Act 1967. In *Re Pumfrey, ex p Hillman*,[1] a trader executed a post-nuptial settlement on 1 July 1875 whereby he, in consideration of the natural love and affection which he bore for his wife, assigned to trustees on certain trusts for the benefit of his wife and children, two houses and furniture and other effects as to the houses, to the payment of rent reserved and to the performance and observance of the lessee's covenants and conditions in the underlease. On 23 February he filed a liquidation petition. On 19 March his creditors resolved to accept a composition, payable in instalments over a period of 18 months. He failed to pay some of the instalments and he was adjudicated a bankrupt. The trustee in the bankruptcy applied to the county court for an order declaring the settlement void as against him under s 91 of the Bankruptcy Act 1869. The county court declared the settlement as to the chattels void but decided that good consideration had been given for the assignment of the two houses. He decided that the settlement in respect of the houses was valid. The trustee appealed to the Chief Judge in bankruptcy. The decision of the learned judge was reversed by the Chief Judge, who said:

> ... The present case does not fall within any of the exceptions, and there can be no doubt that the assignment in question is invalid as against the creditors of the bankrupt, and that the trustee ought to be declared entitled to the households as well as to the chattels.

The decision of the Chief Judge was affirmed by the Court of Appeal. *Ex p Hillman*[1] is relevant to the present case because s 91 of the English Bankruptcy Act 1869 is in pari materia to s 52 of the Bankruptcy Act 1967.

In a more recent case, *Re Abbott (A Bankrupt)*,[2] Sir Robert Megarry VC in his judgment, at p 57, said:

> ... Plainly 'good consideration' in the sense of the natural love and affection that a man has for his wife and children, is not enough. Nor is a merely nominal consideration, even though it would suffice to support a simple contract at common law. In the context of the avoidance of settlements by a trustee in bankruptcy, a 'purchaser' ... for valuable consideration must be someone who can not only be described as being a 'purchaser' but can also be said to have given a consideration for his purchase which has a real substantial value, and not one which is merely nominal or trivial or colourable.

The above passage was adopted by the Australian High Court in *Borton* v *Official Receiver*.[3]

From the authorities I have just cited, I am satisfied that the said land was not purchased by the respondent for valuable consideration. Therefore, the second exception is not applicable to this case.

It is the contention of the respondent that the transfer of the said land falls under the third exception. I shall now consider whether the transfer of the said land falls under the third exception. In order to consider this question it is necessary to ascertain the meaning of the words '... property which has accrued to the settlor after marriage in right of his wife ...' in the third exception. The relevant provision in s 52 of the Bankruptcy Act 1967 is in pari materia with s 42 of the English Bankruptcy Act 1914. In *Re Bower Williams, ex p Trustee*[4] the English Court of Appeal considered the meaning of the

third exception in the light of the evidence before it. In that case a husband and wife married in 1913. In 1925 the wife died intestate, and the husband became entitled jure mariti to certain shares in a company which had belonged to her. The husband took out letters of administration to her estate. He then made a voluntary settlement of the shares on certain trusts for the benefit of their daughter as well as for himself. Ten months later he was adjudicated a bankrupt. The question before the court was whether the property settled accrued to the husband 'in right of his wife' within the meaning of s 42(1) of the Bankruptcy Act 1914. The Court of Appeal decided that the property had accrued to the husband 'after marriage in right of his wife' within the meaning of the exception in s 42, and the settlement, so far as the daughter was concerned, was valid against the trustee in bankruptcy. In his judgment at p 278, Lord Hanworth MR said:

> ... So I think that here the husband takes because he is the husband, not because he is the administrator ... I think the judgments of Cotton LJ, and Lord Lindley both make that clear. A little further on Lord Lindley says:
>
> > 'There is now no doubt as regards the choses in action of the wife not reduced into possession during the coverture, that if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law and in equity; but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, holds them in trust for the husband. That appears to me to be the law as settled ever since the case in *Peere Williams.*'
>
> For these reasons, and because that case is binding on this court, it appears to me that we must hold that the beneficial interest in these shares accrued to the bankrupt in right of his wife, and therefore, the settlement on the daughter remains good.

Lawrence LJ in his judgment in the same case at p 279 said:

> The question is whether the property settled by this settlement does not fall within the exception in s 42 of the Bankruptcy Act 1914, as property which has accrued to the bankrupt after marriage 'in right of his wife'. The property consists of shares in a limited company which stood in the name of the bankrupt's wife at her death. It is not disputed that the beneficial interest in these shares vested in the bankrupt on the death of his wife, but it was strenuously contended that, as the husband took no interest in the shares during his wife's lifetime, they did not accrue to him in right of his wife. It is said that the words 'in right of his wife' in the exception in s 42 only apply to property acquired by the husband during the coverture, and are not applicable to property acquired by the husband after the determination of the coverture and in respect of which property it is necessary to take out letters of administration. There is no authority which binds the court to confine the language of s 42 in that way. The property accrued to the bankrupt solely by virtue of his position as husband. Further, the beneficial interest would have vested in him, whether letters of administration had been taken out by him or by some other person. In my opinion, the shares were property which accrued to him 'in right of his wife' within the ordinary meaning of that expression.

Following the decision in *Re Bower Williams,*[4] it seems to me that the words '... property which has accrued to the settlor after marriage in right of his wife ...' in s 52 of the Bankruptcy Act 1967, mean that the property must be in the name of the wife. It is immaterial whether she acquired it before or after marriage. The property is accrued to the husband solely by virtue of his position as a husband when the wife dies intestate. Under the section the property can only be acquired by the husband during coverture.

From the evidence in the present case it is clear that the said land was registered in the name of the respondent's husband. This is evident from a copy of the document of title exhibited to the respondent's affidavit. According to the document, the said land was registered in the name of the respondent's husband on 17 April 1943, that is after their marriage. In her affidavit, the deponent did not expressly state that she contributed towards the purchase of the land. In any event her name does not appear in the document of title as the co-owner of the said land. The land was only transferred to her name on 23 December 1978. Applying the principles laid down in *Re Bower Williams,*[4] to the present case, I do not think, after considering the facts in the present case, that the respondent's case comes under the third exception. In the circumstances, the transfer of the said land to the respondent is absolutely void against the Official Assignee under s 52 of the Bankruptcy Act 1967.

The respondent however claims that since the said land was acquired during the subsistence of their marriage, she is entitled, under her personal law and under 'adat' law to claim one-half share of the said land as 'harta sepencarian'. It is not in dispute that the respondent is a Muslim and a Malay and that she married her husband in Kuala Lumpur and that she is residing in Kuala Lumpur. In her affidavit, she was relying on the third exception on the ground that she was entitled to claim one-half share of the said land as 'harta sepencarian'. She stated that the transfer of the said land to her was merely to perfect her title to it.

It is now necessary to consider the Malay customary law relating to 'harta sepencarian'. The principle of 'harta sepencarian' has been laid down by Raja Azlan Shah J, as he then was, in *Roberts alias Kamarulzaman* v *Ummi Kalthom.*[5] In his judgment at p 165, the learned judge said:

> ... 'harta sepencarian' is a matter of Malay 'adat' and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her lifetime; this rule of law is local which the court must take judicial notice ... I am of the view that once it is clearly established that

> property was acquired subsequent to the marriage out of their joint resources or by their joint efforts, a presumption arises that it is 'harta sepencarian'. The presumption is rebuttable such as by the evidence that the property was acquired by the sole efforts or resources of the husband.

The learned judge held that the property in question was acquired by the joint resources of the parties and therefore it was 'harta sepencarian'. He ordered that the property be sold and the proceeds be shared equally between the parties.

The decision in the *Roberts* case[5] was approved by the Federal Court in *Mohamed* v *Commissioner of Lands & Mines, Trengganu & Anor.*[6]

It will be noted that in *Roberts'* case,[5] once it is established that property was acquired during the subsistence of the marriage out of the joint resources of the husband and wife, a presumption arises that the property is 'harta sepencarian'. See also *Boto' bte Taha* v *Jaafar bin Muhamed*[7] and *Habsah bte Mat* v *Abdullah bin Jusoh.*[8] In the present case, the respondent, in her affidavit, averred that the said land was acquired during the subsistence of their marriage out of their joint resources and efforts even though the land was registered in the name of the bankrupt. In my opinion, in view of the evidence contained in the respondent's affidavit, there is a presumption that the said land is 'harta sepencarian'. There is no evidence before me to rebut the presumption.

Although there is a presumption that the said land is 'harta sepencarian', it seems to me that the respondent cannot claim her share of the said land during the subsistence of their marriage. I am unable to find any authority on this point but I think it is logical to say that since the said land is registered in the name of the husband, he is entitled to sell it or transfer it to a third person during the subsistence of the marriage, with or without the respondent's consent and if the said land is sold, the husband can keep all the proceeds of the sale to himself.

In my opinion a wife can only claim her share of 'harta sepencarian' when she is divorced by her husband or when the husband is dead. In his book, *Islamic Law in Malaya* (1975) at p 229, Professor Ahmad Ibrahim wrote, '... a divorced wife is entitled to a share of all land acquired during marriage ...'. In the *Roberts* case,[5] Raja Azlan Shah J said at p 165, that with regard to '... the division of the 'harta sepencarian', I can safely say that ... a divorced spouse is entitled to a share ...'. In *Habsah bte Mat* v *Abdullah,*[8] Callow J said at p 61:

> ... In my judgment once it is established that the property was acquired subsequent to marriage, and the wife was seen working thereon, a presumption arises that on divorce it is subject to sharikat ...

See also *Boto' bte Taha* v *Jaafar;*[7] and *Mohamed* v *Commissioner of Lands & Mines, Trengganu & Anor.*[6]

With regard to a claim by a wife after the death of her husband, see *Hujah Lijah bte Jamal* v *Fatimah bte Mat Diah.*[9]

The respondent however claimed in her affidavit that she was entitled to a share of the said land as the widow of the bankrupt. In para 8 of her affidavit she states:

> I am advised and verily believe that as the lawful widow, I am entitled under my personal law and pursuant to the Malaya Adat Law to claim one-half share of the said land as 'harta sepencarian' at the time of his death.

It is not clear when her husband died but it must be after he was adjudicated a bankrupt. In any event, the respondent is entitled to one-half share of the said land under 'harta sepencarian' upon the death of her husband.

For the reasons stated above, I make the following order:

(1) I declare that the transfer of the land comprised in Grant No 11027, lot No 8, mukim Batu by the bankrupt, Senator Ibrahim bin Haji Yaakob, to his wife, the respondent on 22 December 1978 was a voluntary settlement and is void against the Official Assignee, under s 52 of the Bankruptcy Act 1967.

(2) I order that the Pendaftar Geran-Geran Tanah, Wilayah Persekutuan, the proper registering authority, cancel the said transfer.

(3) The respondent is entitled to one-half share of the said land as the widow of the bankrupt under 'harta sepencarian'. If the said land is sold to pay the creditor or creditors of the bankrupt, she is entitled to receive half of the proceeds of the sale of the said land and her share of the proceeds of the sale cannot be used to pay her late husband's creditor or creditors.

Order accordingly.

Solicitors: *Khairuddin & Associates; Skrine & Co.*

Reported by *Eunice Lee Fei Fung*